

Federal Communications Commission

FCC 01-29 ROOM

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Joint Application by SBC Communications)
Inc., Southwestern Bell Telephone Company,)
and Southwestern Bell Communications)
Services, Inc. d/b/a Southwestern Bell Long)
Distance for Provision of In-Region,)
InterLATA Services in Kansas and Oklahoma)
)

CC Docket No. 00-217

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MEMORANDUM OPINION AND ORDER

Adopted: January 19, 2001

Released: January 22, 2001*

By The Commission: Chairman Kennard issuing a statement; Commissioner Ness concurring and issuing a statement; Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a statement; Commissioner Powell approving in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION

1. On October 26, 2000, SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance (collectively SWBT) filed this application for authority under section 271 of the Communications Act, as amended, to provide in-region, interLATA services in the states of Kansas and Oklahoma.¹ We grant the application in this Order based on our conclusion that SWBT has taken the statutorily required steps to open its local exchange markets to competition in each of these states. As required by section 271, we find that SWBT has made a separate and independent showing of compliance for both states.

2. This Order represents the first time that we have approved a section 271 application for a more rural state, and the first time we have ruled on a section 271 application for a second state within a single BOC region. The general approach used by both the Kansas Corporation Commission (Kansas Commission) and the Oklahoma Corporation Commission (Oklahoma Commission) may serve as a model for the development of successful section 271 applications in other similarly situated states. In particular, we commend both states for using the successful work of the Texas Public Utility Commission (Texas Commission) as a starting point for the development of their own section 271 reviews. This approach demonstrates that more rural states can conduct successful section 271 reviews without overwhelming their regulatory resources by building on the work of other states in their region. In this regard, we also note that rural states may wish to cooperate and pool their resources in addressing section 271 compliance issues when uniform region-wide systems and procedures are used by the BOC.²

3. Both states have taken a number of important steps to facilitate the development of successful section 271 applications by SWBT. Both states conducted proceedings concerning SWBT's section 271 compliance with opportunities for participation by interested third parties.³ Both states adopted a broad range of clearly defined performance measures and standards, and a Performance Assurance Plan designed to create a financial incentive for post-entry compliance with section 271. Although neither state provided for third party testing of SWBT's operations support systems (OSS) offerings, SWBT did arrange for an independent evaluation to determine whether certain automated OSS systems, which were found to satisfy the requirements of section 271 in Texas, were the same as those in Kansas and Oklahoma.⁴

¹ A list of parties that submitted comments or replies is contained in Attachment A.

² The BOC must make an independent showing of section 271 compliance for each individual state, however.

³ At the same time, we note that several parties criticize the state consideration of pricing issues. *See, e.g.,* Z-Tel Supp. Comments at 2-3; IP Communications Supp. Comments at 2-3 and 7-8.

⁴ *See infra*, Section IV.B.2.

4. Despite the fact that Kansas and Oklahoma are more rural than other states where this Commission has granted section 271 authorization, competition is developing in response to the market opening measures taken by SWBT and the state commissions in these states. For example, SWBT states that competitors serve between 9.0 percent and 12.6 percent of the total access lines in its service area in Kansas.⁵ SWBT adds that competitive local exchange carriers (LECs) serve between 85,000 and 145,000 business lines and more than 46,000 residential lines in its service territory in Kansas.⁶ While many of these lines are served through resale, SWBT states that there are at least 26 competitive LECs providing facilities-based local exchange service in Kansas.⁷ SWBT adds that between 37,000 and 98,000 lines in Kansas were served by competitors over their own facilities as of August 2000.⁸ SWBT also cites a number of factors as evidence that competition is growing rapidly in Kansas.⁹

5. SWBT also states that in Oklahoma competitive LECs serve between 5.5 percent and 9.0 percent of the total access lines in SWBT service territory.¹⁰ This corresponds to between 115,000 and 170,000 lines.¹¹ SWBT adds that its competitors serve more than 66,000 business lines and at least 49,000 residential lines in Oklahoma.¹² SWBT also states that between 61,000 and 114,000 lines are served by competitors over their own facilities.¹³ In addition, SWBT states that competition is growing rapidly in Oklahoma, citing a number of factors in support of this assertion.¹⁴

6. Our analysis in this Order is affected by that fact that this joint application follows on the heels of authorization in another of SWBT's in-region states, Texas. In many ways, SWBT's process of opening its local market and satisfying the requirements of section 271 in Texas serves as a precursor, and as a model, for the process it followed in Kansas and Oklahoma.

⁵ SWBT Smith/Johnson Aff. at 7; *see also*, SWBT Brief at 14. Since SWBT does not have access to exact information on the number of lines in Kansas and Oklahoma served by competitive LECs, it has used several methods to estimate the number of lines served by its competitors. Each of these methods produces a somewhat different result, and the ranges cited reflect these differences. *Id.* at 14, n.25; SWBT Smith/Johnson Aff. at 11.

⁶ SWBT Application at 14.

⁷ Smith/Johnson Aff. at 8; SWBT Application at ii-iii.

⁸ *Id.* at 14.

⁹ SWBT Smith/Johnson Aff. at 5.

¹⁰ *Id.* at 7, Table 3.

¹¹ SWBT Application at 17.

¹² *Id.*

¹³ *Id.*

¹⁴ SWBT Smith/Johnson Aff. at 5.

Rather than reiterate background matters and jurisprudence set forth in the *SWBT Texas Order*,¹⁵ and re-visit issues that were briefed, reviewed and resolved in that proceeding, we focus our analysis in this Order on a handful of issues that were contested by commenting parties, or that have not been addressed by the Commission in prior section 271 orders. Chief among these issues is pricing. We also consider SWBT's assertion that the systems and processes used to provision wholesale services to competing carriers in Kansas and Oklahoma should pass the checklist requirements because they are the same systems and processes found to be satisfactory in the Texas proceeding. As required by the statute, we have considered separately for each state covered by SWBT's application here whether SWBT has made all of the showings required by section 271. In conclusion, we find that SWBT has met its burden in demonstrating, for Kansas and Oklahoma respectively, that it complies with all applicable statutory requirements.

II. BACKGROUND

A. Statutory Framework

7. In the 1996 Act, Congress conditioned BOC provision of in-region, interLATA service on compliance with certain provisions of section 271. Pursuant to section 271, BOCs must apply to this Commission for authorization to provide interLATA services originating in any in-region state.¹⁶ Congress has directed the Commission to issue a written determination on each application no later than 90 days after the application is filed.¹⁷

8. To obtain authorization to provide in-region, interLATA services under section 271, the BOC must show, with respect to each state for which it seeks authorization, that: (1) it satisfies the requirements of either section 271(c)(1)(A), known as "Track A" or 271(c)(1)(B), known as "Track B"; (2) it has "fully implemented the competitive checklist" or that the statements approved by the state under section 252 satisfy the competitive checklist contained in section 271(c)(2)(B);¹⁸ (3) the requested authorization will be carried out in accordance with the requirements of section 272;¹⁹ and (4) the BOC's entry into in-region, interLATA market is

¹⁵ See *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18361, para. 13 (*SWBT Texas Order*).

¹⁶ See 47 U.S.C. § 271.

¹⁷ *Id.* § 271(d)(3).

¹⁸ *Id.* § 271(d)(3)(A). The critical, market-opening provisions of section 251 are incorporated into the competitive checklist found in section 271. See *id.* § 251; see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom, Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

¹⁹ 47 U.S.C. § 271(d)(3)(B).

“consistent with the public interest, convenience, and necessity.”²⁰ The statute specifies that, unless the Commission finds that these four criteria have been satisfied, the Commission “shall not approve” the requested authorization.²¹

9. Section 271(d)(2)(A) requires the Commission to consult with the United States Attorney General before making any determination approving or denying a section 271 application. The Attorney General is entitled to evaluate the application “using any standard the Attorney General considers appropriate,” and the Commission is required to “give substantial weight to the Attorney General’s evaluation.”²²

10. In addition, the Commission must consult with the relevant state commission to verify that the BOC has one or more state approved interconnection agreements with a facilities-based competitor, or a Statement of Generally Available Terms and Conditions (SGAT), and that either the agreement or general statement satisfy the “competitive checklist.”²³ Because the Act does not prescribe any standard for Commission consideration of a state commission’s verification under section 271(d)(2)(B), the Commission has discretion in each section 271 proceeding to determine the amount of weight to accord the state commission’s verification.²⁴ The Commission has held that, although it will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the Commission’s role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.²⁵

B. History of this Application

11. Both the Kansas Corporation Commission (Kansas Commission) and the Oklahoma Corporation Commission (Oklahoma Commission), after more than two years of reviewing SWBT’s compliance with the requirements of section 271, have endorsed Southwestern Bell’s application to provide in-region, interLATA services in their respective states.

²⁰ *Id.* § 271(d)(3)(C).

²¹ *Id.* § 271(d)(3); see *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 413, 416 (D.C. Cir. 1998).

²² 47 U.S.C. § 271(d)(2)(A).

²³ *Id.* § 271(d)(2)(B).

²⁴ *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3962, para. 20 (*Bell Atlantic New York Order*); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20559-60 (1997) (*Ameritech Michigan Order*); see also *SBC Communications v. FCC*, 138 F.3d at 416 (“although the Commission must consult with the State commissions, the statute does not require the FCC to give State commissions’ views any particular weight”).

²⁵ *Ameritech Michigan Order*, 12 FCC Rcd at 20560; *SBC Communications v. FCC*, 138 F.3d at 416-17.

1. The Kansas Commission's Evaluation

12. On January 21, 1997, the Kansas Commission initiated a proceeding to examine SWBT's compliance with requirements of section 271.²⁶ This proceeding was open to participation by all interested parties and numerous CLECs participated.²⁷ SWBT filed a draft section 271 application with the Kansas Commission on February 17, 1998.²⁸ On March 16, 2000, SWBT filed a revised draft of its section 271 application that included a model interconnection agreement ("Kansas Section 271 Interconnection Agreement" or "K2A").²⁹ The K2A is based on a model interconnection agreement developed by the Texas Public Utilities Commission ("The Texas Commission");³⁰ but also includes arbitration decisions of the Kansas Commission and Kansas-specific terms. The K2A also includes a performance remedy plan, modeled after the plan adopted by the Texas Commission.³¹

13. In May 2000, the Kansas Commission invited interested parties to file comments on SWBT's application in two phases.³² The initial phase focused on the K2A interconnection agreement, performance measures, and the performance remedy plan. The second phase focused on remaining portions of the draft application. On August 21, 2000, the Kansas Commission issued a report ("Kansas Commission Staff Report") in which it reviewed SWBT's compliance with section 271(c) (1)(A), the 14 checklist items in section 271(c)(2)(B), and the separate affiliate requirements of section 272.³³ The Staff Report also reviewed the public interest requirements under section 271(d)(3)(C) and the performance measures and performance remedy plan proposed by SWBT. Although recognizing areas of concern, Commission staff concluded that SWBT had met its obligations under section 271.³⁴ In September and October, the Kansas

²⁶ Kansas Commission Comments at 3.

²⁷ See SWBT Cleek Aff. at para. 25.

²⁸ Kansas Commission Comments at 3.

²⁹ Kansas Commission Comments at 4; SWBT Application at 5.

³⁰ See *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18361, para. 13 (*SWBT Texas Order*). In the Texas 271 proceeding, a model interconnection agreement was developed and adopted which was referred to as the "Texas 271 Agreement" or "T2A." The Texas Commission, SWBT, and competing carriers worked collaboratively to identify and resolve a number of key issues related to SWBT's compliance with 271, including the operational readiness of SWBT's OSS, and the development of a performance monitoring and enforcement mechanism.

³¹ SWBT Application at 5.

³² Kansas Commission Comments at 4; SWBT Cleek Aff. at para. 38 ; SWBT Application at 5.

³³ Kansas Commission Comments at 4.

³⁴ *Id.* See also SWBT Cleek Aff., Attach. A at 134-138 (*In the Matter of Southwestern Bell Telephone Company-Kansas' Compliance with Section 271 of the Federal Telecommunications Act of 1996*, Docket No. 97-SWBT-411- (continued....)

Commission held several administrative meetings considering revisions and modifications to the K2A. On October 4, 2000, the Kansas Commission concluded that SWBT had satisfied the requirements of section 271, and that it would support SWBT's section 271 application. On October 9, 2000, pursuant to the Kansas Commission's direction, SWBT filed a revised final K2A.³⁵

14. On November 17, 2000, the Kansas Commission filed comments in this proceeding. The Kansas Commission concluded that SWBT has complied with the checklist of section 271, that SWBT has complied with the requirements of section 272, and that it would be in the public interest to approve SWBT's application.³⁶ On December 11, 2000, the Kansas Commission filed its reply comments. We commend the Kansas Commission for its analysis.

2. The Oklahoma Commission's Evaluation

15. In 1997, this Commission rejected SWBT's initial application to provide in-region, interLATA services in Oklahoma, finding that SWBT did not face sufficient competition in Oklahoma to satisfy the requirements of "Track A" (section 271(c)(1)(A)).³⁷ In February 1998, SWBT filed a second draft application with the Oklahoma Commission.³⁸ The Oklahoma Commission reviewed SWBT's application and heard testimony from participating parties. On June 9, 2000, SWBT submitted a revised draft of its proposed application to the Oklahoma Commission, which included a model interconnection agreement (the "Oklahoma Section 271 Agreement or the O2A").³⁹ This model agreement, like the K2A, was based on the Texas 271 Agreement, and incorporated arbitration decisions of the Oklahoma Commission and Oklahoma-specific terms. After hearings and review, the Oklahoma Commission approved the O2A on September 28, 2000, subject to several modifications.⁴⁰ The Oklahoma Commission also set low

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GIT, Staff's Recommendation)(August 21, 2000)("Kansas Commission Staff Report"). The Kansas staff stated that there were several concerns regarding the proposed performance remedy plan. Some concerns expressed were the derivation of the "K" Table values, the verification and validation of source data, the frequency of small samples, the use of Z- testing as part of SWBT's benchmark testing and Type I and Type II errors. We agree with the Kansas Commission that none of these issues, based on evidence in this proceeding, warrant denial of the application.

³⁵ SWBT Application at 8.

³⁶ Kansas Commission Comments at 44.

³⁷ See *In the Matter of Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685 (1997), *aff'd*, *SBC Communications Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998).

³⁸ SWBT Application at 10.

³⁹ SWBT Application at 10-11.

⁴⁰ See SWBT Application at 11; *Application of the Attorney General of the State of Oklahoma, et al., To Explore Southwestern Bell Telephone Co.'s Compliance with Section 271(c) of the Telecommunications Act of 1996*, Cause (continued....)

interim rates for several unbundled network elements. To provide incentive to SWBT to establish permanent rates, the Oklahoma Commission held such rates would be subject to "true up" only until March 28, 2001.⁴¹ On October 24, 2000, SWBT filed a revised, final O2A pursuant to the Oklahoma Commission's request.⁴²

16. The Oklahoma Commission filed initial comments in this proceeding on November 17, 2000. The Oklahoma Commission recommended approval of the application on grounds that all statutory requirements have been satisfied, and also arguing that the entry of SWBT into the long distance market will benefit not only long distance markets within Oklahoma, but will encourage competition in the local exchange market in Oklahoma.⁴³ On December 11, 2000, the Oklahoma Commission filed reply comments responding to specific issues raised by commenters in this proceeding. The Oklahoma Commission also urged that we give deference to its determination that competition exists in Oklahoma and that the requirements of section 271 have been met.⁴⁴ We commend the Oklahoma Commission for its analysis.

3. Department of Justice Evaluation

17. The Department of Justice filed its evaluation of SWBT's application on December 4, 2000. In its evaluation, the Department of Justice first focuses on the prices at which SWBT provides interconnection and unbundled network elements (UNEs) in Kansas and Oklahoma.⁴⁵ The Department of Justice recommends that the Commission undertake an independent scrutiny of recurring and nonrecurring UNE rates in Oklahoma, and nonrecurring UNE rates in Kansas.⁴⁶ The Department of Justice also expresses concern over the interim nature of the rates for collocation and a number of UNEs.⁴⁷ The Department of Justice next questions the sufficiency of SWBT's evidence in support of its OSS in Kansas and Oklahoma. SWBT relies heavily in its application on assertions that it provides wholesale services in Kansas and Oklahoma through the same OSS as in Texas, and argues that it has previously demonstrated that these systems satisfy section 271 requirements.⁴⁸ The Department of Justice finds that the

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No. PUD 970000560, Order No. 445180 (Oklahoma Commission, Sept. 28, 2000) ("Oklahoma Commission Sec. 271 Order").

⁴¹ SWBT Application at 11.

⁴² Oklahoma Commission Comments at 2.

⁴³ *Id.*

⁴⁴ Oklahoma Commission Reply Comments at 27.

⁴⁵ Department of Justice Evaluation at 2.

⁴⁶ *Id.* at 13-20, 25-27.

⁴⁷ *Id.* at 24-25, 27-28.

⁴⁸ *Id.* at 28-36.

evidence offered by SWBT to demonstrate that its OSS is, indeed, the same as in Texas, is “ambiguous and incomplete” in several respects. The Department of Justice also urges the Commission to establish the kind of evidentiary showing that will be expected of future applicants who seek to rely, as SWBT does, on findings from prior section 271 proceedings.⁴⁹

III. PROCEDURAL AND ANALYTICAL FRAMEWORK

18. The terms of the competitive checklist generally incorporate by reference the core local competition obligations that sections 251 and 252 impose on all incumbent LECs. In a variety of proceedings since 1996, the Commission has discharged its statutory authority to issue comprehensive rules and orders giving specific content to those obligations. In determining whether a BOC applicant has met the local competition prerequisites for entry into the long-distance market, therefore, we evaluate its compliance with our rules and orders in effect at the time the application was filed. We emphasize that a BOC must comply with all of the Commission’s rules implementing the requirements of section 251 and 252 beginning on the dates specified by those rules.⁵⁰

19. As the Commission stated in the *SWBT Texas Order*, despite the comprehensiveness of our local competition rules, there will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC’s obligations to its competitors – disputes that our rules have not yet addressed and that do not involve *per se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.⁵¹ Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such fast-track, narrowly focused adjudications are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability.⁵² Second, such a requirement would undermine the congressional intent of section 271 to give the BOCs an incentive to open their local markets to competition. That incentive would largely vanish if a BOC’s opponents could effectively doom any section 271 application by raising a host of novel interpretive disputes in their comments and demanding that authorization be denied unless each one of those disputes is resolved in the BOC’s favor. Finally, simply as a matter of statutory construction, few of the

⁴⁹ *Id.* at 29-30.

⁵⁰ *SWBT Texas Order*, 15 FCC Rcd at 18368, para. 29.

⁵¹ *See American Tel. and Tel. Co. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000).

⁵² As the D.C. Circuit has held, “[A]llowing collateral challenges could change the nature of section 271 proceedings from an expedited process focused on an individual applicant’s performance into a wide-ranging, industry-wide examination of telecommunications law and policy.” *American Tel. and Tel. Co. v. FCC*, 220 F.3d at 631.

substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing; they rely for their content on the Commission's rules.⁵³

A. Procedural Framework

20. In the context of section 271's adjudicatory framework, the Commission has established certain procedural rules governing BOC section 271 applications.⁵⁴ Among other things, these rules provide an opportunity for parties other than the Department of Justice and the relevant state commission to comment on section 271 applications.

21. These procedural rules have served the Commission well by deterring incomplete section 271 filings by the BOCs. In particular, they are designed to prevent applicants from presenting part of their initial *prima facie* showing for the first time in reply comments.⁵⁵ We do not expect that a BOC, in its initial application, will anticipate and address every argument its opponents might make in their comments. Based on the state proceedings, however, the BOCs should be able to identify most of the significant arguments and allegations that parties are likely to make in their filings before the Commission.⁵⁶ Thus, the rules provide that when an applicant files new information after the comment date, the Commission reserves the right to start the 90-day review period again or to accord such information no weight in determining section 271 compliance.⁵⁷ An exception to this approach exists for new information that is directly responsive to allegations raised in the comments. The Commission has also strictly limited the consideration of developments that occur after the date for filing comments.⁵⁸

22. In this proceeding, we waive these procedural requirements on our own motion pursuant to section 1.3 of the Commission's rules,⁵⁹ to the extent necessary to consider rate

⁵³ *SWBT Texas Order*, 15 FCC Rcd at 18367, para. 27.

⁵⁴ See, e.g., *Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708 (Dec. 6, 1996) (Dec. 6, 1996 Public Notice); *Revised Comment Schedule for Ameritech Michigan Application, as amended, for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice, DA 97-127 (Jan. 17, 1997) (Jan. 17, 1997 Public Notice); *Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 13 FCC Rcd 17457 (Sept. 19, 1997) (Sept. 19, 1997 Public Notice); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA-99-1994 (Sept. 28, 1999) (Sept. 28, 1999 Public Notice).

⁵⁵ *Ameritech Michigan Order*, 12 FCC Rcd at 20573, para. 54.

⁵⁶ *Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 36; *Ameritech Michigan Order*, 12 FCC Rcd at 20575, para. .

⁵⁷ Sept. 28, 1999 Public Notice at 3.

⁵⁸ *Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 36.

⁵⁹ 47 CFR § 1.3.

reductions filed by SWBT on day 63 of the 90-day period for Commission review of the Kansas and Oklahoma section 271 applications. “[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”⁶⁰ We conclude that the special circumstances before us in this case warrant a deviation from the general rules for consideration of late-filed information or new developments that take place late in the application review process. In the particular circumstances presented by this application, we conclude that considering these late-filed rate reductions will serve the public interest. At the same time, we emphasize that in the absence of such special circumstances, we will continue to adhere to our general rules designed to ensure a fair and orderly process for the consideration of section 271 applications within the 90-day statutory deadline.

23. There are a number of special circumstances that support grant of this waiver to permit consideration of these rate reductions in determining section 271 compliance, and thus satisfy the first element of the test for grant of a waiver described above. First, the rate changes at issue are quite limited in nature. Basically, SWBT has made uniform percentage rate reductions, subject to specified rate floors, in certain categories of rates in Oklahoma and Kansas.⁶¹ SWBT has not modified the rate structure developed in the state proceedings or modified the rates developed by the states with a combination of rate decreases and increases. As a result, addressing the effect of these rate revisions in terms of compliance with section 271 places a limited additional analytical burden on the Commission staff and commenting parties.⁶² This differs significantly from the consideration of more complex rate revisions. It also differs from consideration of promises of future action, which may or may not actually take place.⁶³ It is also different from implementation of measures designed to achieve nondiscriminatory performance in the applicant’s provision of service to competitive LECs, since it is often impossible to determine the actual effect of such changes on performance in advance. Second,

⁶⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 at 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

⁶¹ Letter from Geoffrey M. Klineberg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 (filed Dec. 28, 2000) (SWBT Dec. 28 *Ex Parte* Letter). SWBT’s December 28, 2000 *ex parte* filing is an amended version of an *ex parte* filing it made on December 27, 2000.

⁶² In light of this and the nature and extent of the comments filed concerning these rate reductions, we cannot accept claims that interested parties did not have a reasonable opportunity to comment.

⁶³ Contrary to the arguments of certain commenting parties, there is no uncertainty concerning the availability of these rates to competing LECs. The Kansas Commission has approved these rate reductions with the reductions to become effective immediately. Letter from Eva Powers, Assistant General Counsel, Kansas Corporation Commission, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 at 2 (filed Jan. 5, 2001) (Kansas Commission Jan. 5 *Ex Parte* Letter) and Attach. 1 (Order Approving Revisions to the K2A, Docket No. 97-SWBT-411-GIT at 1-3 (Jan. 4, 2001)) (Kansas Commission Jan. 4 Order). The Oklahoma Commission adopted the modified rates on January 10, 2001. See, Letter from Geoffrey M. Klineberg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 (filed Jan. 12, 2001) (SWBT Jan. 12 *Ex Parte* Letter) at Attach. C (Final Order Approving Adoption of Amendment to Interconnection Agreement, Cause No. PUD 20010006 (Jan. 10, 2001))

because of the very limited nature of these rate changes, interested parties have had a reasonable opportunity to evaluate them and comment in a meaningful manner.⁶⁴ The nature of these rate changes has also permitted the Commission staff to evaluate these rate changes reasonably, within the 90-day review period.

24. Third, this is an instance in which an applicant has responded to criticism in the record by taking positive action that will clearly foster the development of competition. This is very different from the typical situation in which late-filed material provided by the applicant consists of additional arguments or information concerning whether its current performance or pricing satisfies the requirements of section 271. Fourth, these are otherwise generally persuasive applications, which demonstrate a commitment to opening local markets to competition as required by the 1996 Telecommunications Act.

25. We also conclude that, subject to certain limiting conditions described below, grant of this waiver will serve the public interest and thus satisfy the second element of the waiver standard described above. In particular, grant of this waiver permits the Commission to act on these section 271 applications quickly and efficiently without the procedural delays inherent in restarting the 90-day clock. Grant of this waiver also provides positive reinforcement to SWBT for responding to criticism in the record concerning its rate levels by making pro-competitive rate reductions. Given that interested parties have had a meaningful opportunity to comment on these rate reductions, we do not believe that the public interest would be served in this instance by strict adherence to our procedural rules. At the same time, as discussed below, we emphasize that we do not intend to allow a pattern of late-filed changes to threaten the Commission's ability to maintain a fair and orderly process for consideration of section 271 applications.

26. Although we conclude that grant of this waiver to permit consideration of these rate reductions at this time is superior to requiring that SWBT refile its application or restart the 90-day clock in order to obtain consideration of these rate reductions, we reiterate that we continue to expect applicants to make every effort to ensure that section 271 applications are complete when filed. Indeed, we believe it would be rare for other parties to satisfy the high bar set here in future applications. We expect the parties to file a complete application, including any prices on which they want the Commission to rely in its decision, on day one. Nonetheless, although we do not decide here whether we would ever accept amendments to prices within the first twenty days of the filing, for purposes of this application, we condition the grant of this waiver on delaying the effective date for 43 days after release. This represents one day for each day between day 20 and day 63, when SWBT filed these rate revisions. We believe that delaying the effective date in the instant application ensures that SWBT does not receive the full benefits of late-filed changes.

⁶⁴ See *Comments Requested in Connection with Southwestern Bell's Section 271 Application for Kansas and Oklahoma*, CC Docket No. 00-217, Public Notice, DA No. 00-2912 (rel. Dec. 27, 2001) (Dec. 27 Public Notice); *Comment Schedule Set in December 27th Public Notice Remains the Same*, Public Notice, CC Docket No. 00-217, DA-00-2917 (December 28, 2000).

27. Under the special circumstances present in these applications, we cannot agree with the commenting parties that urge us to decline to consider these rate revisions or to treat these revisions as a new filing that starts the 90-day review period.⁶⁵ We cannot agree that consideration of these late-filed rate reductions permits SWBT to benefit by delaying the opening of its local markets in these states to competition. If these rate reductions had become effective the day before SWBT filed these applications, there would be no question concerning the propriety of considering the new rates under our procedural rules. Moreover, the statute does not require that a BOC demonstrate that it has been in compliance with section 271 for some period of time before it files a section 271 application. While we strongly encourage applicants to resolve issues concerning rate levels fully before they file section 271 applications, we do not believe that the limited delay in reducing these rates in Oklahoma and Kansas is sufficient to warrant excluding them from consideration. At the same time, we share, to some extent, the concerns expressed by a number of parties that applicants might attempt to use grant of this waiver to “game” the section 271 process with repeated last minute rate reductions.⁶⁶ We have already made clear that we do not expect applicants to do this repeatedly and we will look with disfavor on any situation in which a single applicant attempts to make such rate reductions late in the application review period on multiple occasions. This concern about the potential for future abuse does not persuade us, however, that it would be better to refuse to consider the rate reductions in this case or treat them as the filing of a new application and restart the 90-day review period since we can address such problems if and when they actually occur.

B. Analytical Framework

28. As part of our determination that a BOC has satisfied the requirements of section 271, we consider whether the BOC has fully implemented the competitive checklist in subsection (c)(2)(B).⁶⁷ In demonstrating compliance with each item on the competitive checklist, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality.⁶⁸ In particular, the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.⁶⁹ Previous Commission orders addressing section 271 applications have elaborated on this statutory

⁶⁵ See, e.g., ALTS Supp. Comments at 3-5; AT&T Supp. Comments at 2; Allegiance Supp. Comments at 3-5; ConnectSouth Supp. Comments at 3-4; Cox Supp. Comments at 1-4; IP Supp. Comments at 7-13; McLeodUSA Supp. Comments at 2; Sprint Supp. Comments at 2-4; WorldCom Supp. Comments at 1-3.

⁶⁶ See, e.g., AT&T Supp. Comments at 1-3; IP Supp. Comments at 2-3 & 7-8; Z-Tel Supp. Comments at 2-3.

⁶⁷ See 47 U.S.C. § 271(d)(3). As set forth below, we conclude that SWBT has satisfied the requirements of subsection (c)(1)(A) (“Track A”) and thus its application merits analysis under section 271(d)(3)(A)(i) of our rules.

⁶⁸ *Bell Atlantic New York Order*, 15 FCC Rcd at 3973-74, para. 52.

⁶⁹ 47 U.S.C. § 271(c)(1)(B)(i), (ii).

standard. First, for those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in “substantially the same time and manner” as it provides to itself.⁷⁰ Thus, where a retail analogue exists, a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness.⁷¹ For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a “meaningful opportunity to compete.”⁷²

29. We note that a determination of whether the statutory standard is met is ultimately a judgment we must make based on our expertise in promoting competition in local markets and in telecommunications regulation generally.⁷³ We have not established, nor do we believe it appropriate to establish, specific objective criteria for what constitutes “substantially the same time and manner” or a “meaningful opportunity to compete.”⁷⁴ Whether this legal standard is met can only be decided based on an analysis of specific facts and circumstances. Therefore, we look at each application on a case-by-case basis and consider the totality of the circumstances, including the origin and quality of the information before us, to determine whether the nondiscrimination requirements of the Act are met. We reemphasize that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement.⁷⁵

1. Analysis of Performance Data

30. SWBT reports performance data pursuant to over 120 detailed metrics established by the Texas Commission, and adopted by the Kansas and Oklahoma Commissions. These performance measurements cover the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions it performs in the course of providing wholesale services to competing LECs. For most of these performance measurements, SWBT’s performance with respect to competitors is compared against either an analogous retail function or a benchmark performance level. Each of these categories of performance data is commercially important, and

⁷⁰ *SWBT Texas Order*, 15 FCC Rcd at 18373, para. 44; *Bell Atlantic New York Order*, 15 FCC Rcd at 3971, para. 44.

⁷¹ *Bell Atlantic New York Order*, 15 FCC Rcd at 3971, para. 44; *Ameritech Michigan Order*, 12 FCC Rcd at 20618-19.

⁷² *Id.*

⁷³ *SWBT Texas Order*, 15 FCC Rcd at 18374, para. 46; *Bell Atlantic New York Order*, 15 FCC Rcd at 3972, para. 46.

⁷⁴ *Id.*

⁷⁵ *Id.*

each has an effect on the ability of competitive LECs to attract, service and maintain customers. For example, a competing LEC must rely on timely responses to pre-ordering queries so that it can interact on a real-time basis with a prospective customer. Ordering and provisioning performance by the BOC will affect a competitor's ability to provide service to its customers within a commercially reasonable time frame, and delays or other flaws in these processes may (among other things) cause end users to cancel orders. In addition, end users may well decide to return to the incumbent if the BOC provides poor maintenance and repair service for unbundled local loops used by competitors.

31. As established in prior section 271 orders, and consistent with our analysis in this order, we have found that performance measurements provide valuable evidence regarding SWBT's compliance or noncompliance with individual checklist items. We emphasize, however, that we do not view each particular metric as wholly dispositive of checklist compliance. Nor do we suggest that the parity and benchmark standards established by state commissions represent absolute maximum or minimum levels of performance necessary to satisfy the competitive checklist. Rather, where these standards are developed through open proceedings with input from both the incumbent and competing carriers, these standards can represent informed and reliable attempts to objectively approximate whether competing carriers are being served by the incumbent in substantially the same time and manner, or in a way that provides them a meaningful opportunity to compete. Ultimately, the determination of whether a BOC's performance is consistent with the statutory requirements is a contextual decision based on the totality of the circumstances. To the extent there is no statistically significant difference between SWBT's provision of service to competing carriers on one hand, and retail customers or a state's performance benchmark on the other, we generally need not look any further – particularly absent other evidence of discrimination by the BOC. Where a statistically significant difference exists, however, we will examine the evidence further to make our ultimate determination of whether the statutory nondiscrimination requirements are met.⁷⁶ Thus, we will examine explanations proffered by SWBT or other commenters about whether these differences provide an accurate depiction of the quality of SWBT's performance. We also will consider the degree and duration of the performance disparity, and whether the performance is part of an improving or deteriorating trend.⁷⁷

32. Finally, in some instances, we may find statistically significant differences in certain performance measurements, but conclude that such differences do not warrant a finding of checklist noncompliance. In such cases, we may find that the performance differences are slight, or occur in isolated months, and thus suggest only an insignificant competitive impact. Furthermore, where there are multiple performance measures associated with a particular checklist item, we would consider the performance demonstrated by all the measurements as a whole. Accordingly, a disparity in performance for one measure, by itself, may not provide a

⁷⁶ See *Bell Atlantic New York Order*, 15 FCC Rcd at 3976, para. 59.

⁷⁷ See, e.g., *SWBT Texas Order* at paras. 175, 188 and 293 (instances in which we found that an improvement in performance over time provided us with an indication that problems were being resolved).

basis for finding noncompliance with the checklist. We may also find that the reported performance data is impacted by factors beyond a BOC's control, a finding that would make us less likely to hold the BOC wholly accountable for the disparity. This is not to say, however, that performance discrepancies on a single performance metric are unimportant. Indeed, under certain circumstances, disparity with respect to one performance measurement may support a finding of statutory noncompliance, particularly if the disparity is substantial or has endured for a long time, or if it is accompanied by other evidence of discriminatory conduct or evidence that competing carriers have been denied a meaningful opportunity to compete.

33. In sum, we do not use performance measurements as a substitute for the 14-point competitive checklist. Rather, we use performance measurements as valuable evidence with which to inform our judgment as to whether a BOC has complied with the checklist requirements. Although performance measurements add necessary objectivity and predictability to our review, they cannot wholly replace our own judgment as to whether a BOC has complied with the competitive checklist.

2. Relevance of Previous Section 271 Approvals

34. In the New York and Texas 271 proceedings, we were able to place significant reliance on two types of evidence in concluding that the BOC was providing interconnection, resold services, and access to unbundled network elements in accordance with the requirements of section 271. First, in both applications, the applicants offered sufficient and reliable evidence of nondiscriminatory performance, based on substantial volumes of transactions. Second, in both cases, a comprehensive test of the functions and capabilities of the BOC's operations support systems ("OSS") was conducted by an independent third party. In the instant application, the volumes of commercial orders – although they have increased in recent months – are significantly lower than they were in New York and Texas. In several instances, as discussed below, volumes are so low as to render the performance data inconsistent and inconclusive.⁷⁸ In addition, no comprehensive, independent third party test of SWBT's OSS was conducted in either Kansas or Oklahoma.

35. In support of this application, SWBT urges us to place significant reliance on the Commission's findings in the *SWBT Texas Order*, on grounds that many of its systems and processes used in Kansas and Oklahoma, as well as the legal obligations imposed by the Kansas and Oklahoma Commissions, are the same as those reviewed and approved in the Texas 271 proceeding.⁷⁹ We agree that findings in the *SWBT Texas Order* may be a relevant factor in our analysis in this proceeding. Where SWBT provides evidence that a particular system reviewed

⁷⁸ We have never required, however, an applicant to demonstrate that it processes and provisions a substantial commercial volume of orders, or has achieved a specific market share in its service area, as a prerequisite for satisfying the competitive checklist. See *Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77 (explaining that Congress had considered and rejected language that would have imposed a "market share" requirement in section 271(c)(1)(A)).

⁷⁹ See SWBT Brief at 19; SWBT Reply at 28-52.

and approved in Texas is also used in Kansas and Oklahoma, our review of the same system in this proceeding will be informed by our findings in the *SWBT Texas Order*. Indeed, to the extent that issues have already been briefed, reviewed and resolved in a prior section 271 proceeding, and absent new evidence or changed circumstances, an application for a related state should not be a forum for re-litigating and reconsidering those issues. Moreover, as noted by the Department of Justice, this approach can “avoid the delay and expense of redundant testing.”⁸⁰ We emphasize, however, that the statute requires us to make a separate determination of checklist compliance for each state and, accordingly, we do not consider any finding from the *SWBT Texas Order* to be dispositive of checklist compliance in this proceeding. While our review may be informed by our prior findings, we will consider all relevant evidence in the record, including state-specific factors identified by commenting parties, the states, the Department of Justice.

36. We also find, as discussed in further detail below, that SWBT’s actual performance in Texas may be relevant to our analysis of the commercial readiness of SWBT’s OSS in this proceeding, as well as to determinations with respect to other checklist items.⁸¹ We find that performance data based on low volumes of orders or other transactions is not as reliable an indicator of checklist compliance as performance based on larger numbers of observations. Indeed, as SWBT itself recognizes, where performance data is based on a low number of observations, small variations in performance may produce wide swings in the reported performance data.⁸² It is thus not possible to place the same evidentiary weight upon – and to draw the same types of conclusions from – performance data where volumes are low, as for data based on more robust activity. We note, however, that we have always held that an applicant’s performance towards competing carriers in an actual commercial environment is the best evidence of nondiscriminatory access to OSS and other network elements.⁸³ Accordingly, even where an applicant seeks to rely on findings made in a prior, successful section 271 application (the “anchor” state), then, our analysis will always start with actual performance towards competitors in the applicant state. Indeed, evidence of satisfactory performance in another state cannot trump convincing evidence that an applicant fails to provide nondiscriminatory access to a network element in the applicant state.

37. Moreover, because our review of a section 271 application must be based on a snapshot of a BOC’s recent performance at the time an application is filed, we cannot simply rely on our findings relating to an applicant’s performance in an anchor state at the time we issued the determination for that state. The performance in that state could change due to a multitude of

⁸⁰ See Department of Justice Evaluation at 28.

⁸¹ See section IV.B.2, *infra*.

⁸² See SWBT Dysart Decl. at para. 81 (noting that a small sample size could overstate disparities) and 88 (noting that, where order volumes are low, a single missed installation could preclude reaching a benchmark target).

⁸³ See *SWBT Texas Order*, 15 FCC Rcd at 18376, para. 53; *Bell Atlantic New York Order*, 15 FCC Rcd at 3974, para. 53.

factors, such as increased order volumes or shifts in the mix of the types of services or UNEs requested by competing carriers. Thus, even when the applicant makes a convincing showing of the relevance of anchor state data, we must examine how recent performance in that state compares to performance at the time we approved its section 271 application, in order to determine if the systems and processes continue to perform at acceptable levels.

38. We recognize, as does the Department of Justice, that this application presents us with the first opportunity to materially rely on this form of evidence in granting a section 271 application. We note, however, that the Commission has adopted the practice of reviewing evidence from other applications and states in previous section 271 proceedings. For instance, in the *First BellSouth Louisiana Order*, we used our evaluation of BellSouth's OSS in South Carolina as a "starting point" for our evaluation of its OSS in Louisiana, where the Commission had recently released the *BellSouth South Carolina Order*.⁸⁴ Furthermore, in the three BellSouth section 271 orders, we found performance measurements covering performance in BellSouth's entire region to be relevant to our consideration of the individual applications.⁸⁵ Such evidence was relevant, we explained, because BellSouth had adequately shown that it used essentially the same OSS system throughout its nine-state region.⁸⁶ Appropriately employed, such a practice can give us a fuller picture of the BOC's compliance with the section 271 requirements while avoiding, for all parties involved in the section 271 process, the delay and expense associated with redundant and unnecessary proceedings and submissions.

IV. PRIMARY ISSUES IN DISPUTE

39. In prior orders, we organized our discussion of the section 271 requirements sequentially, following the order of the statutory provision. In so doing, we have discussed in considerable detail the analytical framework and particular legal showing required to establish

⁸⁴ See *Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231, Memorandum Opinion and Order, 13 FCC Rcd 6258, para. 21 (*BellSouth Louisiana Order*); see also *Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, 13 FCC Rcd 539 (*BellSouth South Carolina Order*).

⁸⁵ See *Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20655, para. 88 (*Second BellSouth Louisiana Order*); *BellSouth Louisiana Order*, 13 FCC Rcd at 6258, para. 21; *BellSouth South Carolina Order*, 13 FCC Rcd at 593-95, paras. 97 and 100.

⁸⁶ While we found region-wide evidence to be relevant in the BellSouth proceedings, we found in each instance that BellSouth, overall, had failed to carry its burden of demonstrating that it provided nondiscriminatory access to its OSS. See, e.g., *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20657 *et seq.*, paras. 91 *et seq.* We thus did not determine whether region-wide performance data, absent any state-specific data, could suffice to demonstrate checklist compliance. Moreover, because the region-wide performance data or holdings from prior orders were not decisional in those instances, we did not examine BellSouth's assertion that its OSS was the same throughout all of its in-region states with the same scrutiny as here.

checklist compliance. Rather than simply recite prior jurisprudence, we focus instead in this order first on those issues and checklist items in controversy, based on the record developed in this proceeding. Accordingly, we begin by addressing whether SWBT has satisfied the requirements for Track A in both Kansas and Oklahoma. Next, we consider checklist item number two, which encompasses access to unbundled network elements, including issues related to OSS, combinations of network elements and Enhanced Extended Links (EELs). We then discuss checklist item number four, access to unbundled local loops, and checklist item number one, which covers interconnection and collocation. The remaining checklist requirements are then discussed briefly since they received little or no discussion from commenting parties, and our own review of the record leads us to conclude that SWBT has satisfied these requirements. Finally, we discuss issues concerning compliance with section 272 and the public interest requirement. It is our hope that this approach will serve to focus attention on the checklist items that tend to raise the most questions about compliance with section 271, while reducing the discussion of the checklist requirements that do not raise such questions.

A. Compliance with Section 271(c)(1)(A)

40. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).⁸⁷ To qualify for Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."⁸⁸ The Act states that "such telephone service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier."⁸⁹ The Commission concluded in the *Ameritech Michigan Order* that section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers.⁹⁰

1. Kansas

41. We conclude, as the Kansas Commission did, that SWBT demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with competing carriers in Kansas. In support of its Track A showing, SWBT relies on interconnection agreements with Global Crossing, Sprint, Birch Telecom and Ionex Communications.⁹¹ Specifically, the record demonstrates that both Ionex Communications and

⁸⁷ 47 U.S.C. § 271(d)(3)(A).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Ameritech Michigan Order*, 12 FCC Rcd at 20589, para. 85; see also *BellSouth Louisiana Order*, 13 FCC Rcd 20633-35 at paras. 46-48.

⁹¹ SWBT Application at 15-16.

Birch Telecom provide service to residential subscribers exclusively over their own facilities using the UNE platform.⁹² Sprint also provides local exchange service to business and residential subscribers.⁹³

42. Although there has been considerable dispute in the record regarding the exact number of residential customers served by these carriers,⁹⁴ we conclude that a sufficient number of residential customers are being served by competing LECs through the use of their own facilities to demonstrate that there is an “actual commercial alternative” to SWBT in Kansas.⁹⁵ We note that commenters have complained that SWBT’s method of estimation overstates the number of customers.⁹⁶ We find, however, that SWBT’s response to these competitors in its reply comments, in conjunction with its *ex parte* submissions on this subject, support our conclusion that more than a *de minimis* number of residential customers are served via UNE-P in Kansas.⁹⁷

43. On January 18, 2001, Sprint filed a motion to strike an *ex parte* letter submitted by SWBT on December 20, 2000, on grounds that SWBT had failed to follow the proper procedures for filing confidential material and that a redacted version of the letter had not been

⁹² SWBT Reply at 73; SWBT Smith Reply Aff. at para. 12; Birch December 29 *Ex Parte* Letter at 1-2 (confidential version). We recognize that SWBT, and other carriers, have requested confidential treatment of estimated and actual customer counts, pursuant to the protective order in this proceeding. See *In the Matter of Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Kansas and Oklahoma*, Protective Order, CC Docket No. 00-217, DA-00-2415 (October 26, 2000).

⁹³ SWBT Application at 16; SWBT Reply at 72; See also Sprint Comments at 9.

⁹⁴ AT&T Turner Decl. at paras. 2-3; Sprint Comments at 8-9 and 14 (arguing that its residential customers served on its facilities had been participating in pre-commercial testing and had only recently begun receiving bills, and that Birch appears to offer residential service only via resale); Cox Comments at 5; Global Crossing Comments at 1-3 (arguing that it has no facilities based residential customers in Kansas); ALTS Reply Comments at 4; WorldCom Reply Comments at 15, 20-22; but see Kansas Commission Comments at 6-7.

⁹⁵ See *SWBT Oklahoma Order*, 12 FCC Rcd at 8695, para. 14 (construing section 271(c)(1)(A) as requiring that “there must be an actual commercial alternative to the BOC in order to satisfy” Track A). The D.C. Circuit affirmed this reading of Track A. See *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

⁹⁶ AT&T Turner Decl. 6-8 (arguing that SWBT’s assumption of 2.75 access lines per interconnection trunk overestimates the number of facilities-based CLEC lines and disputing SWBT’s use of its E911 database to estimate facilities-based CLEC activity); Cox Comments at 4; Sprint Comments at 4-6; WorldCom Reply Comments at 19.

⁹⁷ See SWBT Reply at 71-73. SWBT stated that, at the time it filed its reply brief, it was in the process of investigating the number of UNE-P access lines used to provide service to residential customers in Kansas. *Id.* at 73, n.46. On December 20, 2000, SBC filed a written confidential *ex parte* letter presenting the results of its investigation, which indicate that Kansas competing carriers, including Birch Telecom, provide facilities-based service to a significant number of both residential and business customers via UNE-P. See SWBT Dec. 20 *Ex Parte* Letter; see also SWBT Smith Reply Aff. at para. 12.

placed in the public record.⁹⁸ We deny this motion. The information contained in the letter related to the number of residential customers served via the UNE platform by six competitive carriers in Kansas other than Sprint. While Sprint suggests that “it is imperative that such data be vetted through the CLECs [named in the letter] themselves,”⁹⁹ we note that one of the competing carriers, Birch Telecom, did confirm the customer estimate provided by SWBT.¹⁰⁰ Consequently, all that Sprint (or any other commenter) could conceivably have argued, would have been to reiterate its opinion that only a *de minimis* number of residential customers are served by UNE-P in Kansas. As stated above, we reject that argument. Thus, we believe SWBT’s omission resulted in harmless error. Moreover, while we view the *ex parte* letter as providing additional support for SWBT’s assertion that it complies with “Track A,” it is not the only basis of our decision, as noted above.¹⁰¹

2. Oklahoma

44. We conclude, as the Oklahoma Commission did, that SWBT demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with competing carriers in Oklahoma.¹⁰² Specifically, we find that Cox Communications (Cox) provides telephone exchange service either exclusively or predominantly over its own facilities to residential subscribers and to business subscribers.¹⁰³ While several competing carriers, including Cox, challenge the accuracy of SWBT’s estimates,¹⁰⁴ there is no dispute that Cox serves a significant number of residential customers using its own facilities and

⁹⁸ Motion to Strike of Sprint Communications Company (filed Jan. 18, 2000) (*Sprint Motion to Strike*).

⁹⁹ *Sprint Motion to Strike* at 3.

¹⁰⁰ See Letter from Gregory C. Lawhon, Birch Telecom, to Magalie Roman Salas, Secretary, Federal Communications Commission, December 29, 2000 (requesting confidential treatment) (Birch Dec. 29 *Ex Parte* Letter). Sprint notes that this letter also was improperly filed (as it was not also submitted in redacted form). *Id.*, n.2. We nonetheless find that it is appropriate to consider it because it contains the type of confidential carrier-specific information that would be unverifiable by other parties.

¹⁰¹ Finally, as the Commission has explained in a prior section 271 proceeding, “if all other requirements of section 271 have been satisfied, it does not appear to be consistent with congressional intent to exclude a BOC from the in-region, interLATA market solely because the competitors’ service to residential customers is wholly through resale.” *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20635, para. 48. Had we been unable to rely on SWBT’s December 20 *Ex Parte* Letter, or in its other methods of estimation put forth in its comments and replies, we would have been faced by this situation. Based on the totality of circumstances presented by this application, and based on our conclusions regarding checklist compliance, we likely would not have denied this application on “Track A” grounds, and would have relied on the existence of competitors’ service to residential customers through resale.

¹⁰² Oklahoma Commission Comments at 2.

¹⁰³ SWBT Application at 18; SWBT Reply at 72; Cox Comments at 4.

¹⁰⁴ AT&T Turner Decl. at 6-8; Sprint Comments at 4-6; Cox Comments at 4; WorldCom Reply Comments at 19; but see SWBT Reply at 71-73; SWBT Smith Reply Aff. at 7-12.